

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION

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H. THOMAS CADELL, JR., *Chief Counsel*

February 16, 1993

Harvey Hellman
Organization Resources Counselors, Inc.
12400 Wilshire Blvd., Ste. 600
Los Angeles, CA 90025

Re: Vacation Pay Accrual v. Cap

Dear Mr. Hellman:

The State Labor Commissioner, Victoria Bradshaw has asked me to respond to your letter of December 23, 1992, regarding the above-referenced subject.

Your letter contains an attachment setting out a proposed vacation policy which provides that:

"Vacation days not used in the calendar year they were accrued will be carried over to the following year. However, the maximum number of vacation days that can be accumulated in a year is the amount set forth in the vacation eligibility schedule minus the amount carried over from the prior year."

Your letter does not mention whether a worker taking the unaccrued vacation time off during the year who does not complete the time necessary to accrue the full time taken off will be docked for that unaccrued vacation from the employee's final pay? Assuming that the policy you propose does provide that the employer would withhold any unaccrued vacation taken by the employee from the employee's final pay, the vacation policy does not meet the requirements of the law as the Labor Commissioner has interpreted that law.

As you may know, the statute in question provides that the Labor Commissioner is to apply the principles of equity and fairness in resolving any disputes arising under Labor Code §227.3. The Labor Commissioner, in an interpretive bulletin issued in 1986 allows a "cap" to be placed on vacation pay, but "the time periods involved for taking the vacation must, of course, be reasonable."

Harvey Hellman
February 16, 1993
Page 2

Assuming that the policy provided that the employer would recover the unaccrued vacation from the final pay, an employee under your policy who was employed from January 1, 1993, through December 31, 1993, would be required to take his or her fully accrued vacation in January of 1994 in order to earn any more vacation credits.

Obviously, employees who live from paycheck to paycheck could not afford to risk the loss of wages due at termination and would not, as a result, take the vacation until it is fully accrued. Additionally, employees with children in school would be rather reluctant to take vacations in the middle of the winter. However, under the policy you propose, a working mother who started in January would be forced to take her fully-accrued vacation in January of the following year in order to avoid the loss of future vacation benefit accrual.

Under this type of policy, there is no time allowed the employee to take the fully accrued vacation, let alone a reasonable time within which to take the time without risking the loss of future vacation credits. What this policy, in fact, provides is a Hobson's choice for the employee:

Either take the chance that the employer will not lay you off or discharge you within the period of time necessary to accrue the vacation and take unaccrued vacation time which is subject to recovery by the employer from the final pay; or wait until the vacation promised is fully accrued and take the time off at that time (whether the time is convenient or not to the worker's vacation plans) to avoid losing future vacation credits.

I am sure that your client is solely interested in assuring itself that there will be no "growing liability" for accrued vacation benefits. Although I am sure it was not designed to do so, this plan would be neither equitable nor fair. If you look simply at the results of the plan, it appears to be designed to deprive workers of future vacation benefits, although that was not the design.

There are many plans available which will protect the employer from a "growing liability" which employers may face when employees fail to take vacation time off. The policy you propose is not one of the those plans.

A plan which provided that the employee has a minimum seven-month period in which to take vacation accrued in the past year would be appropriate. The failure to take the accrued vacation within that period of time would result in no further vacation being accrued from that point on. That would allow the employee a "reasonable time" to take the vacation and would protect the employer from accruing a large vacation benefit liability.

Harvey Hellman
February 16, 1993
Page 3

I hope this adequately addresses the issues you raise in your letter of December 23rd. I believe this letter clearly sets out the position which the California Labor Commissioner will take in this matter. However, if you have any further questions, please contact the undersigned.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw
Deborah Granfield, Esq.